No. 94-1086

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SGS CONTROL SERVICES, INC.,

Petitioner,

—v.—

INTERNATIONAL ORE & FERTILIZER CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the United States Court of Appeals for the Second Circuit limited in legal theories, or did it have the independent power to apply proper law based on a legal theory that was raised in the complaint, tried and decided by the United States District Court for the Southern District of New York, and specifically addressed in Petitioner's brief to the Court of Appeals?

2. Is there a disproportionality doctrine within the United States Court of Appeals for the Second Circuit, and is there, as Petitioner suggests, an "intra" Circuit dispute within that Court on that disproportionality theory?

STATEMENT REQUIRED BY RULE 29.1

Respondent, International Ore & Fertilizer Corporation ("Interore"), a Delaware corporation, is an indirect, wholly owned subsidiary of Occidental Petroleum Corporation, a Delaware corporation whose shares of common stock are publicly traded on the New York Stock Exchange.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF *CERTIORARI*

Respondent, Interore, respectfully requests that this Honorable Court deny the Petition for a Writ of *Certiorari* seeking to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit filed January 20, 1995 denying the Petition for a Rehearing with a Suggestion for Hearing *En Banc* is reproduced in Petitioner's Appendix at pages A-183-184. The opinion of the United States Court of Appeals for the Second

Circuit affirming the judgment of the United States District Court for the Southern District of New York in favor of Respondent and affirming the award of sanctions is officially reported at 38 F.3d 1279 and is reproduced in Petitioner's Appendix at pages A-2-49. The opinions of the United States District Court for the Southern District of New York in favor of Respondent are officially reported at 743 F.Supp. 250 and 828 F.Supp. 1098, and are reproduced in Petitioner's Appendix at A-50-98 and A-99-131. Petitioner has also included the unreported opinion of the Southern District of New York of October 23, 1993 which denied Petitioner's motion for a new trial, at A-132-140, and which awarded sanctions against Petitioner's attorneys, at A-137-140.

STATEMENT OF THE CASE

This case involves the liability, under New York law, for an independently made inspection and for failure to properly issue an inspector's "certificate of readiness", with the understanding that such issuance would trigger the loading of a ship—a case in which there are no significant legal issues, constitutional, criminal or other which merit the attention of the Supreme Court.

Interore, an international trader of fertilizers, contracted to sell on a cost-and-freight basis, five different, specially blended fertilizers, to East Coast Fertilizer Company Limited in New Zealand. Interore chartered a five-hold bulk vessel, the M/V ADELINA, to transport two parcels from Sweden and three parcels from Tampa, Florida to New Zealand.

Interore hired SGS to certify the weight and to certify the quality of these goods, and, germane to this action, Interore hired Petitioner SGS, an independent inspector, to inspect the vessel ADELINA's holds, prior to loading, in order to ensure that the holds were clean, dry, fit and suitable to receive the fertilizer cargo bound, for New Zealand. If SGS found the

holds clean, dry, fit and suitable, its inspector was to issue its standard "Certificate of Readiness", with the understanding that such issuance would trigger the loading of the fertilizer.

The District Court determined that SGS negligently misrepresented the condition of the holds by issuing a Certificate of Readiness stating the holds were inspected and found clean and fit when in fact the SGS surveyor had not thoroughly inspected the contaminated holds. It is not disputed that all the holds contained residual grains of barley from a prior cargo.

Interore, relying on the SGS certification, loaded the fertilizer into the ADELINA's holds, and the vessel sailed for New Zealand. On arrival in New Zealand, the Ministry of Food & Agriculture found that the fertilizer was contaminated by the barley grain that SGS failed to discover. The fertilizers were rejected by East Coast because of the grain contamination. Diligent attempts were made by Interore to sell the fertilizers to other buyers in New Zealand, Australia and other neighboring countries; however these markets did not offer a viable return on the possible sale of the cargo. Consequently, after several months, the cargo was transported, still on board the same vessel, to Antwerp, Belgium, where it was salvaged and sold.

Interore filed suit against SGS in the Southern District of New York on September 2, 1987, to recover for damage to both the Swedish and Tampa fertilizers, alleging causes of action in contract, warranty, negligence and negligent misrepresentation. This claim, to recover for its loss of more than $2,000,000, was never changed.

The trial had been bifurcated into liability and damages phases in proceedings before Judge Robert J. Ward. Senior Judge Charles H. Tenney tried all issues with respect to liability in September-October, 1989, and rendered a decision based on New York law, holding both Interore and SGS equally responsible for the damages claimed by Interore.

International Ore & Fertilizer Corp. v. SGS Control Services, Inc., 743 F.Supp. 250 (S.D.N.Y. 1990).

Thereafter, Judge Tenney referred this matter to Chief Magistrate Judge Nina Gershon for determination of the "amount of damages". Magistrate Gershon tried the damage phase of the case in March, 1992, and rendered a Report and Recommendation on March 31, 1993, finding SGS was liable to Interore for $479,687.72 plus interest at the T-bill rate from February 1, 1986 until the date of the judgment.

Judge Tenney affirmed and adopted all of the recommendations in the Report of Magistrate Gershon in an opinion dated August 10, 1993 (828 F.Supp. 1098), and entered an Amended Judgment, including interest, in favor of Interore against SGS in the amount of $713,666.27 on September 15, 1993.

On August 26, 1993, SGS moved for a new trial. On October 28, 1993, Judge Tenney denied SGS's motion and imposed Rule 11 sanctions against SGS's counsel. Thereafter, on November 29, 1993, Judge Tenney entered judgment for Interore's reasonable attorney fees in the amount of $3,570.57. SGS timely appealed to the United States Court of Appeals, Second Circuit. Interore cross-appealed and sought the full amount of damages. The case was argued on April 25, 1994, and decided on October 24, 1994. The Court of Appeals (Winter and Van Graafeiland) affirmed the judgment against SGS and the award of sanctions, with a dissent by the Honorable Jacob Mishler, District Judge, United States District Court for the Eastern District of New York, sitting by designation.

On January 20, 1995, the Court of Appeals, Second Circuit, denied the Petition of SGS for rehearing and the suggestion for rehearing *en banc*, the Petition having been transmitted to the judges of the Court in regular active service and to any other judge that heard the appeal, and *no* such judge requested that a vote be taken on the suggestion for rehearing *en banc*.

STATEMENT OF FACTS

Respondent, Interore, is a trader of fertilizer products, buying and selling in the international marketplace. Petitioner, SGS, is an international surveying company which provides inspection, testing and control services in connection with the movement of bulk cargoes.

In May-June, 1985, Interore bought from suppliers and then sold to a New Zealand buyer 22,202 metric tons of five different, specially blended fertilizers on a cost and freight basis at a price of $4,118,287.

In order to deliver the fertilizers, Interore chartered the vessel M/V ADELINA, a 27,687 deadweight bulk carrier, for the ocean carriage from Landskrona, Sweden (where two blends were loaded) and Tampa, Florida (where the other three blends were loaded) to Napier, New Zealand.

The contract with East Coast required Interore to secure the services of an independent inspection company to (a) determine the weight of the fertilizers, and (b) sample and perform chemical analyses of the fertilizers. That contract also called for an inspection of the cleanliness of the holds of the vessel employed for the ocean carriage, and, before loading could commence, the issuance of a Certificate of Readiness. That Certificate of readiness was not one of the documents required to be presented for payment.

Interore hired SGS to perform all of the control service duties and to perform the hold cleanliness inspection. The request is set forth in a telex dated June 19, 1985 from Interore to SGS, which states in pertinent part:

> Pls act our behalf performing inspection, sampling and analysis. Pls issue flwg docs: 1) cert of hold inspection, confirming vsls holds were clean, dry and suitable.

* * *

> If any questions relative to above pls contact us promptly.

SGS sub-contracted with Mr. Peter Luard in Tampa to perform the hold cleanliness inspection and issue the Certificate of Readiness. Mr. Luard was a former employee of SGS, with many years of experience, and had performed many fertilizer hold inspections in Tampa.

The M/V ADELINA arrived in Tampa on June 30, 1985, and was brought to the pier at approximately 0145 hours on July 2. The SGS surveyor boarded the M/V ADELINA at 0145 hours (in the early morning darkness, when the vessel docked and was boarded by Customs and Immigration officials), and signed the Certificate of Readiness at 0215 hours, on July 2, 1985.

Within that short time, 0145 to 0215 hours, the SGS surveyor allegedly performed the contracted for inspection. Obviously, SGS did not perform, as the holds were contaminated with grain.

The vessel departed Tampa on July 4, and arrived in New Zealand on August 1, 1985. The New Zealand Government authorities examined the fertilizers on board the vessel and found the entire cargo of fertilizers contaminated with barley grains; indeed, there were barley plants growing amongst the fertilizers. On the same day, the buyer rejected delivery of the fertilizers because of the contamination, and on August 3 the buyer abandoned the cargo.

After a month and a half, Interore rechartered the ADELINA, sailed to Antwerp, Belgium and salvaged the cargo. Chief Magistrate Gershon awarded Interore the difference between its contract prices at New Zealand and the resale prices, plus the expenses in connection with the resale, which included the ocean freight. The District Court halved the damages recoverable by Interore on the ground that

Interore should have warned SGS of the strict import standard of the New Zealand authorities.

The claim of Interore throughout these proceedings has been to recover these losses from SGS, and its cross-appeal was to recover the full amount of the loss. In its complaint Interore sued in contract, warranty, negligence and negligent misrepresentation.

REASONS FOR DENYING REVIEW ON WRIT OF *CERTIORARI*

In its preliminary statement Petitioner concedes that this matter does not involve a constitutional provision, treaty, statute, ordinance or regulation.

No suggestion is made by Petitioner, and it is clear, that the decision of the United States Court of Appeals for the Second Circuit is not in conflict with any decision of any other United States Court of Appeals. Petitioner's suggestions, (1) that there was an abuse of discretion by the Second Circuit, and (2) that the disproportionality doctrine merits review, are discussed below. It is respectfully submitted that Petitioner's request for review is without merit.

POINT I

WAS THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT LIMITED IN LEGAL THEORIES, OR DID IT HAVE THE INDEPENDENT POWER TO APPLY PROPER LAW BASED ON A LEGAL THEORY THAT WAS RAISED IN THE COMPLAINT, TRIED AND DECIDED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND SPECIFICALLY ADDRESSED IN PETITIONER'S BRIEF TO THE COURT OF APPEALS?

Petitioner has apparently raised a question whether the United States Court of Appeals for the Second Circuit has abused its discretion for claims that have been "waived", to follow Petitioner's categorization. Petitioner's question ignores the fact that claims of Respondent, Interore, were never waived or changed. From the start, Respondent's suit against SGS was the pursuance of an honest and actual, antagonistic assertion of right. Respondent, Interore, did in fact cross-appeal, seeking the full amount of its damages and not the amount limited by the United States District Court for the Southern District of New York. At no time did Interore make a formal waiver, as suggested by Petitioner.

The Respondent, Appellee below, need not have filed any brief in response to the appeal, and, having availed itself of the opportunity to file a brief, was entitled to advance all or some of its arguments. Indeed, even a cross-appeal is unnecessary when the prevailing party advances arguments that merely provide another avenue to reach a proper conclusion. The District Court's decision dealt with the contract issue under New York law. This Honorable Court has said that an appellate court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of gov-

erning law. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991). Indeed, Petitioner in its brief states:

> The Court has recognized that a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief in that court. *United States National Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2178 (1993).

Respondent Interore agrees.

A review by this Court is not needed to clarify whether an Appeals Court can reverse, or as in this case affirm, a lower Court's judgment based on a tort theory and substitute a judgment based on a contract theory, asserted below, even though Appellee did not file a cross-appeal on the contract theory only.

The Second Circuit below found that ". . . we may uphold the validity of a judgment on any grounds, whether or not a cross-appeal has been filed. We may not, however, enlarge a recovery absent such a cross-appeal. We therefore affirm [based on a contract theory as opposed to a tort theory]." *International Ore & Fertilizer Corp. v. SGS Control Services*, 38 F.3d at 1283-1284. *See, also, id.* at 1285-6 for discussion of the above holding.

The above holding and subsequent discussion accurately set forth the appellate standard in the Second Circuit and all other Circuits for affirmation of a District Court decision on grounds not raised by way of cross-appeal. As was stated in *International Trade AD. v. Rensselaer Polytechnic*, 936 F.2d 744, 747 (2nd Cir. 1991), "It is " 'an inveterate and certain' " rule that a party need not cross-appeal in order to assert an alternate ground based on the record to support a district court decree." (Citations omitted.)

The above standard is consistent with that in the other Circuits. *Ithaca Industries Inc. v. C.I.R.*, 17 F.3d 684, 686, F.N.

2 (4th Cir. 1994), ". . . Respondent is free to rely upon any matter appearing in the record in support of the decision below without filing a cross-appeal."; *Retired Chicago Police Ass'n. v. City of Chicago*, 7 F.3d 584, 593, F.N. No. 8 (7th Cir. 1993) "[the prevailing party] may advance, in support of the judgment, all arguments they presented to that court." They need not file a cross-appeal just because the District Judge rejected one of [their] arguments on the way to deciding in [their] favor."; *Hansen v. Director OWCP*, 984 F.2d 364, 367 (10th Cir. 1993), ". . . a cross-appeal is unnecessary when a prevailing party merely advances an argument that would provide another avenue by which an ALJ could reach the same favorable judgment."; *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993), "Plaintiffs therefore have the advantage of the familiar rule that on appeal the prevailing party may support a judgment in its favor on any grounds urged or decided below" (citations omitted); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1197 (9th Cir. 1986), ". . . failure to file a cross-appeal does not, however, constitute a waiver of the contract claim. The theories were argued in the alternative."

The Supreme Court had repeatedly confirmed this appellate standard in the course of deciding other substantive civil, criminal or constitutional issues. *See, Northwest Airlines, Inc. v. County of Kent, Mich.*, ___ U.S. ___, 114 S.Ct. 855 (1994); *United States National Bank of Oregon v. Independent Insurance Agents of America*, ___ U.S. ___, 113 S.Ct. 2173 (1993).

Disingenuously, Petitioner, at page 10 of its Petition, states that SGS did not have a meaningful opportunity to be heard on the contract issue in the Court of Appeals, because of the "waiver" of that issue. For its own reasons, Petitioner included the transcript of the oral argument, where the issue was raised and discussed; but, more importantly, in its brief in the Court of Appeals, Petitioner devoted its First Point to that issue.

Petitioner's Court of Appeals Brief states:

"ARGUMENT

I. INTERORE'S TORT CLAIM MUST BE DISMISSED BECAUSE *INTERORE'S RELATION WITH SGS IS GOVERNED BY COMMERCIAL CONTRACT.*" (Emphasis added.)

Thus, contrary to what SGS asserts in its Petition here, its first and main point (seven pages) in its brief in the Court of Appeals is devoted to its argument on the very point which it now says it did not have the opportunity to brief. It is misleading to this Court for Petitioner to suggest, throughout its argument, that it was deprived of the opportunity to raise issues when this was its main point in its brief below.

Petitioner incorrectly alleges the lack of an expressed standard in order to circumvent the fact that this commercial case about damaged fertilizer does not raise important legal questions or issues of a constitutional nature, criminal procedure or a conflict between the Circuits.

It is to be noted that Petitioner relies on criminal cases on the suggestion of waiver, and overlooks the fact that it is the *appellant* who is required to present issues that the *appellant* desires to litigate. 28 U.S.C., F. R. App. P. Rule 28(a)—compare 28(b) [appellee] ". . . except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied. . . ." Clearly, there is no merit to Petitioner's first presented question.

POINT II

IS THERE A DISPROPORTIONALITY DOCTRINE WITHIN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND IS THERE, AS PETITIONER SUGGESTS, AN "INTRA" CIRCUIT DISPUTE WITHIN THAT COURT ON THAT DISPROPORTIONALITY THEORY?

There is no disproportionality doctrine in the law of the United States Court of Appeals for the Second Circuit and certainly not in maritime matters. Petitioner raises this theory because it arose in another SGS case with the same counsel, in the *dicta* of one judge. *See, Vitol Trading, S.A. v. SGS Control Services,* 874 F.2d 76 (2d Cir. 1989). The disproportionality theory may be of interest to the Petitioner, but is not a real issue.

There is not any conflict with the holding of the Second Circuit in *Sundance Cruises Corp. v. American Bureau of Shipping,* 7 F.3d 1077 (2nd Cir. 1993), as Petitioner suggests, because, in *Sundance,* the disproportionality doctrine was not reached, since the shipowner in that case did not prevail, and did not provide any evidence that it suffered damages, disproportional or not, from the defendant. Even more important, the Court of Appeals for the Second Circuit does not find an *intra*-Circuit conflict, stating, in *International Ore & Fertilizer Corp. v. SGS Control Services,* 38 F.3d 1279 (2nd Cir. 1994), at page 1285:

> * * * We see no reason whatsoever, therefore, why SGS is not liable for Interore's consequential damages as a result of its breach.
>
> Our recent decision in *Sundance Cruises Corp. v. American Bureau of Shipping,* 7 F.3d 1077 (2d Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 1399, 128 L.Ed.2d

> 72 (1994) *is not to the contrary*. [Emphasis added.] *Sundance* was an action for damages on a contract for the classification for insurance purposes of an ocean-going passenger vessel. The court held that the disparity between the fee charged on the contract and damages sought disclosed that the parties did not foresee the risk of such liability. However, the purpose of the contractual obligation of the ship classification society in *Sundance* contrasts markedly with that of the inspector in *Vitol* and in the present case. *Sundance* likened the suit against the classification society to a case in which "one who causes a vehicle accident . . . then sues the Motor Vehicle Bureau for damages to his car because it issued him a driver's license that falsely represented his fitness to drive." 7 F.3d at 1084. In *Sundance*, the court therefore concluded that "the purpose of the classification certificate is not to guarantee safety, but merely to permit [the ship owner] to take advantage of the insurance rates available to a classed vessel." *Id.* The purpose of the inspection in this case, however, was precisely to guarantee the condition of the hold so as to insure the preservation of the cargo. There is no other reason to perform such an inspection and no other reason to pay for one, whatever the amount.

It should be noted that none of the Judges in regular active service in the Second Circuit requested a vote be taken on the rehearing *en banc*.

Disproportionality is of interest to Petitioner, SGS, because unlike SGS, Sweden, which had a tariff limiting liability, Petitioner SGS had no such tariff. The Court below pointed out that Petitioner could have limited liability in line with the fees charged or SGS, if it did not wish to limit its liability by contract could protect itself with insurance, which apparently it did. The suggestion that there is an intra-Circuit problem on disproportionality is artificial.

CONCLUSION

There is no discrepancy in the present state of the law, nor was there any abuse of discretion, nor is there a reason this Court should set a new standard of discretion for the Courts of Appeals, as there is no such issue in this case.

Respondent respectfully submits, there is no reason for granting a writ of *certiorari*.

Respectfully submitted,

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